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IN THE
Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL.,

Petitioners,

v.

CHARLES E. AUSTIN, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS WATCH, AMERICAN FRIENDS SERVICE COMMITTEE, BLUHM LEGAL CLINIC, THE CENTER FOR JUSTICE IN CAPITAL CASES, ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide, with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. In the United States, Human Rights Watch has addressed a range of human rights issues, including U.S. prison conditions. Human Rights Watch has filed amicus briefs before various bodies, including U.S. courts and international tribunals. The proliferation of supermaximum security facilities in which prisoners endure harsh conditions for prolonged periods of time has been a particular concern of Human Rights Watch and the subject of several Human Rights Watch reports. Because the Court's decision in this case will affect the due process rights not only of prisoners in the Ohio State Penitentiary ("OSP"), but also any prisoner that is "administratively" assigned to a supermaximum or "supermax" facility, Human Rights Watch has a substantial interest in the question presented.

The American Friends Service Committee ("AFSC") is a non-profit organization which carries out service, development, social justice, and peace programs throughout

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make any monetary contribution to the preparation or submission of this brief.

the world. Founded by Quakers in 1917, AFSC's work is based on the Quaker belief in the worth of every person and faith in the power of love to overcome violence and injustice. Quakers have long played a role in human rights and criminal justice, having been heavily represented among the founders of what AFSC now regards as a failed experiment in institutionalization called the penitentiary. These institutions were initially comprised of isolation units which are the predecessors of today's "supermax" prisons. AFSC founded and still operates its *PrisonWatch* program to monitor the inhumane conditions in isolation units nationally, has published a variety of reports and histories regarding control or isolation units, and its staff members have testified widely on the issue. In 1985, AFSC published "The Lessons of Marion," which sounded the alarm about the impending future of contemporary control units. In 1997, AFSC published a "Survivor's Manual," written by prisoners living in extended isolation for other prisoners who faced the same situation. AFSC has identified abolition of isolation unit confinement as one of two national criminal justice reform priorities to be addressed in the coming years.

Founded in 1969, the faculty and students of the Bluhm Legal Clinic at Northwestern University School of Law represent clients in a variety of juvenile and criminal proceedings, including criminal appeals and post-conviction proceedings involving clients who are incarcerated in Illinois prisons. The Bluhm Legal Clinic's work on behalf of prisoners awaiting execution and prisoners who have been wrongfully convicted has led its faculty and students to become increasingly concerned about the conditions of confinement in prisons in Illinois and around the country, particularly in "supermax" facilities such as Illinois' Tamms Correctional Center, a "supermax" prison in southern Illinois. The decision rendered by the Supreme Court in this case will necessarily affect conditions of confinement for many of the Bluhm Legal Clinic's clients for years to come.

The Center for Justice In Capital Cases at the DePaul University College of Law was created to train all of the capital defense team -- lawyers, defense investigators and Mitigation specialists, as well as law students who have the opportunity to work on capital cases in the Death Penalty Legal Clinic. Its mission is to create a higher standard of practice in the capital arena through vigorous advocacy and investigation, cutting-edge work in the social sciences, and a client-centered philosophy.

The Illinois Association of Criminal Defense Lawyers is the only statewide criminal defense lawyer's organization in Illinois. It represents both the public and private sectors of the criminal defense bar. It is a not-for-profit organization that retains complete independence from outside funding sources by being supported solely by its members. Its goal is to achieve justice and dignity throughout the criminal justice system by fostering, maintaining, and encouraging the integrity, independence, and expertise of lawyers in the field of criminal defense. Its purpose is to inform members by providing resources via committees, continuing education seminars, and current legislative decisions, as well as to advocate on behalf of the criminal justice system by presenting views and cases before state and federal legislative bodies, and by assisting in the writing of *amici curiae* briefs.

The National Lawyers Guild ("NLG") is a national association of legal professionals, law students and jailhouse lawyers with offices in New York City. The NLG was founded in 1937 as the first inter-racial bar association in the United States. Throughout its history, NLG members have represented literally thousands of prisoners and have advocated on behalf of the Due Process, First Amendment and other rights of incarcerated people. The NLG national executive committee includes two vice-presidents who are jailhouse lawyers and has a number of members who are

jailhouse lawyers. NLG members represented the interests of prisoners injured or killed in Attica, New York in over thirty years of litigation. The issues raised by the instant appeal concerning the due process rights of prisoners who are "administratively" assigned to a supermaximum facility are of vital concern to NLG members and their clients.

SUMMARY OF ARGUMENT

The conditions inmates endure in supermaximum security confinement in the United States are the most harrowing and dehumanizing that courts have found permissible under the Constitution. [2] Prolonged round-the-clock confinement in small, sometimes windowless cells with little or no opportunity for social interaction, mental stimulation or recreational activities, pushes "the outer bounds of what most humans can psychologically tolerate . . . ." *Madrid v. Gomez*, 889 F.Supp. 1146, 1267 (N.D. Cal. 1995), *mandamus denied*, 103 F.3d 828 (9th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997). Courts throughout the country have recognized what numerous studies of and clinical visits to "supermax" facilities have documented: The debasing conditions in which prisoners live result in myriad psychological effects, including anxiety, chronic depression, emotional breakdowns, suicidal thoughts and behavior, paranoia, uncontrollable anger, hallucinations, and hypertension. For those who are mentally ill, being subjected to such conditions has even more perilous consequences, with many inmates suffering dramatic psychological deterioration necessitating hospitalization.

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[2] The Amici submitting this brief do not believe that the conditions of "supermax" confinement, discussed below, should be properly found to pass muster under the Eight Amendment. However, that issue is not before the Court in the instant case.

No inmate should be subjected to such conditions for months, much less years, without an extremely careful, objective and informed determination that such confinement is necessary because of the specific security and safety risks posed by the individual. Indeed, beyond our borders, international human rights principles reinforce that conclusion. International human rights standards as applied are recognized to limit severely the use of such facilities. To the extent supermaximum conditions are to be permitted at all, their use must be carefully circumscribed to circumstances and for durations that are thoroughly justified.

Yet, the record of the process of assignment to supermaximum security confinement demonstrates something quite different. Research and litigation have documented that the use of these facilities are not limited to "the worst of the worst," but that correctional systems all too frequently place inmates in "supermax" facilities arbitrarily, carelessly, and unnecessarily.

Although incarceration necessitates a surrender of many rights and privileges, "prisoners do not shed all constitutional rights at the prison gate . . . ." *Sandin v. Connor*, 515 U.S. 472, 485 (1995). This principle applies in full force to the consideration of rights under the Due Process Clause applicable to the assignment to and continued retention in so-called "supermax" confinement. The procedural protections of due process recognized by the courts below in this case are the minimum constitutional safeguards essential to ensure that these dangerous, dehumanizing facilities be used only where and when the facts are consistent with the justifications for their use. The deprivations are too severe and the adverse psychological toll too great to require anything less than robust procedural protections to ensure that the decisionmakers get it right.

ARGUMENT

This Court has long recognized that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Due process is a flexible concept "and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).[3] A state-created liberty interest, protected by the Due Process Clause, arises in the prison context when the circumstance at issue "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

At minimum, the facilities at issue here impose such hardships and deprivations. As discussed below, the extreme conditions and the dangers posed to the inmates subjected to them demand the highest level of procedural protection

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[3] In *Mathews*, this Court articulated the now-familiar tripartite test for procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

possible to ensure that the use of these facilities is properly limited to those whom require this form of confinement under the justifications for its use. *See Mathews*, 424 U.S. at 341 ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process").

I. The Use Of Supermaximum Security Confinement For Prolonged, Indefinite Periods Through Administrative Assignment Exposes Prisoners To Harsh, Atypical Dehumanizing Conditions.

A. The Use Of "Supermax" Facilities Has Dramatically Expanded Over The Last Two Decades.

Prison systems in the United States have long had "prisons within prisons" -- harsh solitary confinement cells to which prisoners are sent for breaking the rules. Over the last two decades, however, U.S. correctional systems have developed a new generation of super-maximum security units and facilities in which prisoners deemed dangerous or disruptive can be housed indefinitely.[4] More than 20,000 prisoners are now confined under "supermax" conditions, as

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[4] "Supermax" facilities are also known, *inter alia*, as special housing units or security housing units (SHUs) and extended control units (ECUs). The National Institute of Corrections defines "supermax" housing as "a free standing facility or distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated." U.S. Dep't of Justice, *Supermax Housing: A Survey of Current Practice* at 1 (1997), *available at* http://www.nicic.org/pubs/1997/013722.pdf.

corrections officials have considered them a useful management tool for maintaining control over and responding to tension and violence in their facilities. *See* Human Rights Watch, *Out of Sight: Briefing Paper on Supermax Prisons* (2000), *available at* http://www.hrw.org/reports/2000/supermax/.[5] Although in 1984 there existed only one prison in the United States that would today be classified as a "supermax" prison, today 36 states and the federal government currently operate a total of at least 57 supermaximum security units, built either as annexes within existing prisons or as free-standing facilities. *See* Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana* (1997), *available at* http://www.hrw.org/reports/1997/usind/.[6]

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[5] *Out of Sight* draws on extensive research by Human Rights Watch on the conditions and operations of supermaximum security facilities in the United States. Human Rights Watch has inspected eight state and federal "supermax" facilities and reviewed extensive documentation on numerous others.

[6] In almost every state in the United States, exploding prison populations and overstretched budgets have overwhelmed the ability of corrections professionals to operate safe, secure and humane facilities with adequate numbers of properly trained staff and sufficient programs and productive activities for the men and women in their custody. Corrections officials have turned to supermaximum security units to remove dangerous or disruptive prisoners from the general populations as an alternative method to protect both staff and inmates and, it is hoped, deter other prisoners from committing acts that might result in their transfer to such harsh facilities. *See Cold Storage*, *supra*; Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 Crime & Just. 385, 391 (2001).

B. The Typical Conditions Of "Supermax" Confinement Are Severe And Prolonged.

Although conditions and policies vary somewhat from facility to facility, the common characteristics of "supermax" confinement include extreme social isolation; reduced environmental stimulus; scant recreational, vocational, or educational opportunities; and extraordinary levels of surveillance and control. They are undeniably harsh and atypical.

Prisoners spend all their waking and sleeping hours locked alone in small, sometimes windowless cells. The cells, measuring 60- to 80-square feet, typically contain a concrete slab with a thin mattress for a bed, a concrete shelf to serve as a desk, and a toilet and sink combination. The cell door is made of perforated or solid steel with a small fixed window and a slot at the bottom. Prisoners are fed in their cells, their food passed to them on trays through the slot in the door. *See* Human Rights Watch, *Ill Equipped: U.S. Prisoners and Offenders With Mental Illness* at 146 (2003), *available at* http://www.hrw.org/reports/2003/usa1003/; Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, The National Prison Project Journal, Vol. 8 No. 2 at 4 (Spring 1993). Lighting in the cells often remains illuminated all day and night. *See* William Collins, U.S. Dep't of Justice, *Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit* at 7 (2004), *available at* http://www.nicic.org/pubs/2004/019835.pdf; *Jones'El v. Berge*, 164 F.Supp. 2d 1096, 1100 (W.D. Wisc. 2001). Cells may be ventilated but not air conditioned, and inmates have no way to regulate the temperature. *See Cold Storage*, *supra*; *see also Jones'El*, 164 F.Supp. 2d at 1100 (noting that during summertime, average cell temperature can reach 92 degrees and heat index goes above 100 degrees); Collins, *supra*, at 7. During wintertime, "the cell temperature drops

to uncomfortable lows." *Jones'El*, 164 F.Supp. 2d at 1100; *see also Cold Storage, supra.*

A few times a week, prisoners are let out for showers and an hour or less of solitary exercise in a small, enclosed space, "in caged-in or cement-walled areas that may be devoid of any equipment and are so constraining they are often referred to as 'dog runs.'" Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49(1) Crime & Delinq. 124, 126 (2003); *see also Ill Equipped, supra,* at 146; Collins, *supra,* at 7. When prisoners are allowed to leave their cells, they are first chained through the door slot while still inside. *See Cold Storage, supra.* They are commonly subjected to strip searches whenever leaving or returning to the housing block. *See* Collins, *supra,* at 7; *Madrid*, 889 F.Supp. at 1229.

Inmates have no access to out-of-cell work, religious activity, rehabilitation, or other programs or activities to occupy time -- such that "[a]lmost complete idleness is the norm." Collins, *supra,* at 6 (noting that "[a]ny available programs are usually offered in the cell or cell front"). At the Pelican Bay SHU in California, "some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo." *Madrid*, 889 F.Supp. at 1229. Telephone and visitation privileges are extremely limited. *See, e.g., Jones'El*, 164 F.Supp. 2d at 1101 (inmates at Wisconsin "supermax" allowed only one six-minute telephone call per month). Visits are non-contact, with the inmates separated from the visitor by a large piece of plexiglass. *See* Human Rights Watch, *Human Rights Violations in the United States: Red Onion State Prison, Super-Maximum Security Confinement in Virginia* (1999), *available at* http://www.hrw.org/reports/ 1999/redonion/. The dearth, and often absence, of simple human contact in "supermax" confinement is stark:

> In the typical facility, cell doors, unit doors, and shower doors are operated remotely from a control center. Physical contact may be limited to being touched through a security door by a corrections officer while being placed in restraints or having restraints removed. The bulk of verbal communication may occur through intercom systems. Further minimalization of human contact may result from the use of technologies such as cameras; remote listening devices; and remote control devices for televisions, water and lights.

Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* at 11 (1999), *available at* http://www.nicic.org/pubs/1999/ 014937.pdf.

In sum, prisoners in "supermax" facilities "are completely deprived of . . . personal contact, and mental stimulus." *Ruiz v. Johnson*, 154 F.Supp. 2d 975, 985 (S.D. Tex. 2001). Indeed, because of the advanced modern technology in this environment, "prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past." Haney, *Mental Health Issues, supra,* at 127.[7]

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[7] In some facilities, months of good behavior may lead to increased privileges -- *e.g.*, an increase in the number of photographs an inmate can keep in his cell, or access to an in-cell radio -- but those privileges can be and often are eliminated if the inmate commits an infraction, *e.g.*, is disrespectful to an officer. *See Out of Sight, supra.* In any event, the privileges reflect only a tinkering at the edges of the basic model of solitary confinement and do not significantly ameliorate the conditions. *See id.*

Unlike assignment into such facilities that results from disciplinary action, which generally lasts for a fixed term, administrative segregation of the type at issue in this litigation can, and often does, continue indefinitely until the correction authorities unilaterally decide to release the prisoner back to the general prison population. Some prisoners may serve most, if not all, of their prison terms in isolation. *See* Haney, *Mental Health Issues, supra,* at 127. As a report published by the National Institute of Corrections ("NIC") acknowledges, once placed in "supermax" confinement, an inmate "is likely to remain there for at least 12-24 months, if not longer." Collins, *supra,* at 6.

II. Prolonged "Supermax" Confinement Produces Significant Adverse Psychological Consequences For Prisoners.

There is no way to measure the misery and suffering produced by prolonged confinement under these conditions. Inmates have described life in a "supermax" facility as akin to living in "a tomb." *Ill Equipped, supra,* at 150. For many prisoners, the absence of normal social interaction, reasonable mental stimulus and exposure to the natural world -- of almost everything that makes life human and bearable -- is emotionally, physically and psychologically destructive. *See id.*

The adverse psychological effects of extended detention in "supermax" facilities can be as severe as they are abundant. "Supermax" facilities create their "own set of psychological pressures" so powerful that "there are few if any forms of imprisonment that produce so many indices of psychological trauma and symptoms of psychopathology in those persons subjected to it." Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment,* Working Paper for From Prison to Home Conference at 14 (2001), *available at* http://www.aspe.hhs.gov/hsp/prison2home02/Haney.htm. These adverse effects include anxiety, chronic depression,

emotional breakdowns, suicidal thoughts and behavior, paranoia, uncontrollable anger, hallucinations, and hypertension. *See* Haney, *Mental Health Issues, supra,* at 130-32. Indeed, many of the psychological effects of this form of confinement "are analogous to the acute reactions of trauma victims, and the psychiatric sequelae fit the common diagnostic criteria for victims of deprivation and constraint torture techniques." Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 530 (1997).

Every published study of non-voluntary "supermax"-like confinement lasting longer than 10 days has reported "negative psychological effects." Haney, *Mental Health Issues, supra,* at 132. For instance, Dr. Haney[8] conducted research at the Pelican Bay SHU, consisting of personal interviews with a random sample of 100 SHU prisoners.[9] He found notably high levels, *inter alia*, of anxiety (91 percent), irrational anger (88 percent), chronic depression (77 percent), emotional swings (71 percent), impending nervous breakdown (70 percent), talking to self (63 percent), and

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[8] Craig Haney, Ph.D., J.D., specializes in the assessment of individual adjustment to and the psychological effects of incarceration. He has been recognized as "perhaps the nation's leading expert in the area of penal institution psychology." *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 908-09 (S.D. Tex 1999).

[9] The Pelican Bay SHU was the subject of the litigation in *Madrid*, 889 F.Supp. at 1231-32, where the court noted that prison confinement could have a deleterious impact on the mental state of prisoners. ("[T]he Court is well satisfied that a severe reduction in environmental stimulation and social isolation can have serious psychiatric consequences . . . .").

violent fantasies (61 percent). *See id.* at 133-34. At a Texas "supermax" facility, "[e]xperts reported that incidents of self-mutilation and incessant babbling and shrieking were almost daily events." *Ruiz*, 154 F.Supp. 2d at 985.

Prisoners with preexisting psychiatric disorders are at even greater risk of suffering psychological deterioration from prolonged "supermax" confinement. The stresses, social isolation and restrictions of such confinement can exacerbate their illnesses or provoke reoccurrences. According to psychiatrist Dr. Terry Kupers, the conditions can cause someone with a vulnerability to psychosis "to go off the deep end." *Ill Equipped, supra,* at 152. A federal district judge trenchantly observed that placing mentally ill or psychologically vulnerable people in "supermax" conditions "is the mental equivalent of putting an asthmatic in a place with little air to breathe." *Madrid*, 889 F. Supp. at 1265; *see also* Haney & Lynch, *supra*, at 534 ("pre-existing psychiatric disorders among segregated prisoners may render them more vulnerable to the psychological assaults of solitary confinement").

As another court has observed, "extremely isolating conditions in supermaximum confinement cause" symptoms such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder

> in relatively healthy prisoners who have no histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally sevère. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.

Jones'El, 164 F.Supp. 2d at 1101-02; *see also Ruiz*, 154 F.Supp. 2d at 984 (finding that Texas "supermax" units "are

virtual incubators of psychoses -- seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities").

The threat that these facilities pose, particularly to those already prone to mental disorders, is a serious one, because the risk that mentally ill prisoners will end up in supermaximum security units is great. Corrections officials frequently place mentally ill inmates in "supermax" confinement because they lack other housing options, such as secure mental health treatment units or segregation units specifically designed for mentally ill offenders. Moreover, persons with mental illness often have difficulty complying with strict prison rules and controlling their behavior. As a result, the mentally ill are disproportionately represented among prisoners in "supermax" units or facilities. *See Ill Equipped, supra,* at 147-48.

As the NIC has itself recognized, "[t]he very environment that offers the security and control appropriate for dealing with the type of behavior such inmates exhibit may make their mental condition worse." Collins, *supra,* at 16. These findings, as the NIC has acknowledged, "virtually compel the conclusions that corrections departments need effective screening procedures to prevent certain inmates from ever entering the ECU." *Id.* at 18.

The need for careful procedures to prevent the imposition of these horrific dangers on those for whom it is unjustified is not limited to those who already suffer from mental disabilities. After completing a study of the effects of confinement on prisoners at Pelican Bay, Dr. Haney concluded that although prisoners who entered the prison with preexisting mental health problems suffer more acutely, "[t]his kind of environment is capable of creating clinical symptoms in even healthy personalities, and can be psychologically destructive to anyone who enters and endures it for significant periods of time." Haney, *Infamous Punishment* at 6; *see also Madrid*, 889 F. Supp. at 1267

(conditions at Pelican Bay "press the outer bounds of what most humans can psychologically tolerate. . . .").

III. Under These Circumstances, The Constitutional Principles Of Due Process Require At A Minimum The Procedural Protections That The Courts Below Properly Found Lacking In The Ohio State Penitentiary.

Corrections officials justify the extreme deprivations of "supermax" confinement as necessary to confine inmates so dangerous and disruptive that they cannot be safely confined in general population. *See Cold Storage, supra.* These inmates are supposed to be the "worst of the worst" of prisoners. Collins, *supra,* at 6.

> Corrections authorities must be able to exercise discretion and professional judgment in choosing where to confine inmates, but the exercise of such discretion carries the inherent risk of arbitrariness or error. Because of the extreme nature of supermax conditions, particular precautions are needed to minimize those risks and to ensure that no inmate is sent to, nor kept unnecessarily in, supermax confinement.

Out of Sight, supra. In practice, few correctional systems have adequate internal review systems to provide a check on unnecessary "supermax" confinement. Some jurisdictions do not provide inmates with a hearing, or if hearings are provided, they are meaningless formalities. *See id.* An NIC survey of prison systems revealed that the percentage of prisoners housed in "supermax" facilities varies greatly, ranging from less than one percent in some states to more than 20 percent in others -- "rais[ing] the question of whether some jurisdictions may be overclassifying inmates into very expensive prison beds." Collins, *supra,* at 6.

With empty beds in "supermax" facilities and overcrowding elsewhere, corrections systems face overwhelming temptations to send inmates there whose disciplinary histories do not demonstrate the need for such stringent conditions -- *e.g.* inmates who are nuisances. *See Cold Storage, supra*; *Red Onion State Prison, supra*; Kurki & Morris, *supra*, at 385, 389, 392. Particularly problematic is the fact that "many prisoners are placed in supermax not specifically for what they have done but rather on the basis of who someone in authority has judged them to be (e.g., 'dangerous,' 'a threat,' or a member of a 'disruptive' group)." Haney, *Mental Health Issues, supra,* at 127.[10] As a result, "[a]dministrative segregation often amounts to a kind of correctional 'no man's land' in which prisoners are kept segregated and often isolated for reasons of administrative discretion and sometimes mere convenience or unspecified punitive purposes." Haney & Lynch, *supra*, at 561 n.429.

Use of "broad assignment criteria" creates the very real danger that, unchecked by procedural safeguards designed to ensure decisionmakers have as complete a record before them as possible, assignments will be made in order to fill "supermax" facilities, "rather than providing safeguards against arbitrary and unnecessary admissions, as was their original purpose."[11] Kurki & Morris at 389, 392.

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[10] Such common admission criteria include gang activity or disruption of orderly prison operation. *See* Kurki & Morris, *supra,* at 389.

[11] Even with procedural protections, many correctional authorities use overly broad and vague criteria for determining supermax eligibility and fail to exercise appropriate control over placement decisions. As a result, inmates across the country have been placed in "supermax" facilities even where such conditions are excessive in light of

(Footnote continued)

The district court in the instant case found this very problem present in the Ohio system: Because of the temptation to fill the "surplus" of "supermax" units, "Ohio risks having a 'because we have built it, they will come' mind set." *Austin v. Wilkinson*, 189 F.Supp. 2d 719, 724 (N.D. Ohio 2002). Consequently, prison administrators "consider inmates for placement [in 'supermax'] who do not need its level of restrictions." *Id.; see also Cold Storage, supra.*

The NIC has acknowledged that "the extraordinarily high levels of security in ['supermax' facilities] -- and the restrictions that go with that security -- mean that these facilities sometimes function at the limits of what is constitutionally acceptable." Collins, *supra,* at xv. For this reason, among others, an NIC report has endorsed the idea of "limiting the use of extended control housing to inmates who present a 'clear and present danger.'" Riveland, *supra,* at 6.

As the NIC implicitly acknowledged, decisions to place an inmate in "supermax" facilities are not just routine "housing" decisions. The extreme deprivations and the grave psychological impact of "supermax" on many prisoners constitute an "atypical and significant hardship" as envisioned under *Sandin* -- "the risk of an erroneous deprivation ...." of the liberty interest in avoiding confinement there could not be greater. *Mathews*, 424 U.S. at 335; *see also* Collins, *supra,* at 51 ("It is not surprising

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their behavior. *See Out of Sight, supra*. Indeed, inmates are assigned to "supermax" confinement for relatively minor disciplinary infractions, such as verbally insulting a guard, throwing water at (and missing) a guard, or covering up cell windows while washing. *See* Amnesty International, *USA: A Briefing for the UN Committee against Torture* at 23 n.45 (2000), *available at* http://web.amnesty.org/library/index/engamr510562000.

that courts would regard ECU placement -- with its typically long duration, very strict conditions, and limited privileges -- as an atypical deprivation, compared to the ordinary conditions of prison life").

Under such circumstances, a fair and thorough procedural mechanism for evaluating prisoners is the only means to guarantee that assignment to "supermax" is proper and properly limited in duration. *See* Collins, *supra,* at 51 ("placement process that includes due process procedures . . . furthers the . . . goal of basing ECU placements on reliable information and sound judgment"); Riveland, *supra*, at 2 ("Caution in expanding the types and number of inmates placed in these facilities will serve all parties well.").

The need for the decisionmaker to make a "predictive" decision does not change the importance of an accurate factual predicate on which the decisionmaker will act. The danger of exposing prisoners to the grueling conditions of "supermax" confinement for extended periods, functioning at best "at the limits of what is constitutionally acceptable," warrant -- and, in fact, demand -- that the process be structured to do everything possible to make sure the decisionmaker gets it right. In the United States, the goals of fairness and accuracy are obtained through procedural protections -- the type of procedural safeguards that the district court found necessary and that the Sixth Circuit affirmed in this case.

IV. Procedural Safeguards Are Required To Protect The Internationally Recognized Human Rights Of Prisoners.

A. Principles Of International Law Properly Inform And Illuminate American Constitutional Jurisprudence.

International law and opinion, although not binding upon the courts of the United States, instruct and illuminate American constitutional jurisprudence. *See Sosa v. Alvarez-*

Machain, 124 S. Ct. 2739, 2764 (2004) ("For two centuries [this Court] has affirmed that the domestic law of the United States recognizes the law of nations") (internal citations omitted). Just this week, in *Roper v. Simmons*, this Court stated: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, No. 03-633, 2005 U.S. Lexis 2200 at * 48-49 (March 1, 2005). This articulated principle continues the tradition of this Court looking "within the world community" when faced with complex constitutional issues, "considering the views of 'respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.'" *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 n.31 (1988)); *see also Edmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) ("'climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant'") (quoting *Coker v. Georgia*, 433 U.S. 584, 596, n.10 (1977)). In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court, in overturning certain criminal statutes as applied to activities of consenting adults, noted that the "right of homosexual adults to engage in intimate, consensual conduct . . . has been accepted as an integral part of human freedom in many other countries." 539 U.S. at 576-77. In reaching its holding in that case, the Court cited with approval decisions of the European Court of Human Rights, because they reflect "values we share with a wider civilization." *Id.* at 573, 576.

This consideration of international law and opinion is particularly apt in discussing the nature of constitutionally mandated due process in the assignment to and review of confinement in "supermax" facilities. The fair and just treatment of prisoners is an issue that spans all continents and resonates across the globe. A review of international

law and opinion on the issue before the Court, moreover, unquestionably reinforces the importance of providing the highest levels of due process protections to ensure that prisoners are assigned to "supermax" facilities only when and where the circumstances meet the justification offered for their use.

B. "Supermax" Facilities Raise Serious Human Rights Concerns.

The conditions in "supermax" facilities, as with conditions in any other prisons, are "subject to human rights standards contained in treaties signed by the United States and binding on state and federal officials." *Out of Sight, supra.*

These standards were first enunciated in the *Universal Declaration of Human Rights*, G.A. res. 217A (III), December 10, 1948, of which the United States is a signatory. Article Five of that Declaration states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." To similar effect, the *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), December 16, 1966, ratified by the United States in 1992, states in Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 10 further provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[12] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UN Convention") also states, in Article 16: "Each Party State shall undertake to prevent . . . acts of cruel, inhuman or degrading treatment or

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[12] Article 10 requires that "the reform and social rehabilitation of prisoners" be an "essential aim" of imprisonment.

punishment. . . ." *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* , G.A. res. 39/46, December 10, 1984. *See also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,* (E.T.S. 126, Nov. 26, 1987), *Historical Background and Main Features of the Convention,* Ref.: CPT/inf/C (89)(2) ("European Convention") ("the Convention's aim is to strengthen the protections of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment").

C. Human Rights Experts Agree That Extensive Procedural Protections Are Essential And Must Accompany Assignment To "Supermax" Facilities.

1. The United Nations Committee Against Torture And The European Committee For The Prevention Of Torture And Inhuman Or Degrading Treatment Or Punishment

In response to a report submitted by the United States, that discussed, *inter alia*, "supermax" conditions, the United Nations Committee against Torture ("CAT")[13] expressed its concerns about "the excessively harsh regime of the 'supermaximum' prisons" within the United States. *Consideration of Reports Submitted by State Parties Under*

[13] CAT is established pursuant to the UN Convention and "consists of experts of high moral standing and recognized competence in the field of human rights." *UN Convention*, Article 17. Countries that have ratified the Convention are required to submit to CAT "reports on the measures that they have taken to give effect to the undertakings of the Convention. . . ." *Id.*, Article 19. CAT may comment on a report "as it considers appropriate. . . ." *Id.*

Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture: United States of America, A/55/44, ¶¶ 175-180 at ¶ 179(f) (May 15, 2000). Additional guidance as to how the principles of international law apply to the issues before this Court can be found in the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), established under the European Convention, and which is recognized as an influential source of minimum standards for the treatment of prisoners. Since 1990, the CPT has carried out 189 prison visits in 46 member States and, as a result of those visits, has developed minimum standards relating to humane treatment of prisoners, set forth in the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) CPT Standards, Substantive Sections of the CPT 's General Report* CPT/INI/E (2002) 1-Rev. 2004 (CPT Standards).[14]

The CPT acknowledges "that in every country there will be a certain number of prisoners who present particularly high security risks and hence require special conditions of detention." *Id.* at 27. It is this group of prisoners "that is of particular concern to the CPT, as the need to take exceptional measures . . . brings with it a greater risk of inhuman treatment." *Id.* "The CPT pays particular attention to prisoners held, for whatever reason," including as a result of their "dangerousness" or their "troublesome"

[14] The CPT is composed of experts in the field of human rights or prison or police matters. It examines the treatment of prisoners in member countries through on-site visits to prisons, "with a view to strengthening the protection of such persons from torture and from inhuman or degrading treatment or punishment." *European Convention, Chapter I, Article 1.*

behavior," under conditions "akin to solitary confinement." *Id.* at 20. Such isolated confinement, according to the CPT, can severely impair physical and mental health. *See Cold Storage, supra.*

Because of the serious deprivations and potential damage caused by confinement of this sort,[15] the CPT has

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[15] The CPT recognizes that "[s]olitary confinement can, in certain circumstances, amount to inhuman and degrading treatment." *CPT Standards* at 20. It has further recognized, reflecting the same conclusions as reached in the studies cited above, *supra* pp.12-16, that "all forms of solitary confinement, without appropriate mental and physical stimulation, are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities." *Id.* Echoing the particularly strong evidence of damage to those with pre-existing mental conditions, the CPT recommends that "no mentally-ill person be held in such a unit." European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Portuguese Government on the visit to Portugal, from 14 to 26 May 1995*, CPT/Inf (96) 31 [EN] (1996). The CPT has also recognized other aspects of this type of imprisonment that must be carefully circumscribed and monitored. *See CPT Standards* at 27 (finding that "because it can do much to counter the deleterious effects on a prisoner's personality, . . . a satisfactory program of activities, including education, sports and work of a vocational nature, to be just as important -- if not more so -- in a high security unit than on normal location"). "Moreover, even when specific security measures are required, such measures should never involve depriving the prisoners concerned of natural light and fresh air." *Id.* at 25. These "are basic elements of life which all prisoners are entitled to." *Id.*

stated that when making a decision about whether to subject a prisoner to placement in such solitary confinement, "the principle of proportionality calls for a balance to be struck between the requirements of the situation and the imposition of a solitary-confinement-type regime." *CPT Standards* at 20. "It is axiomatic that prisoners should not be subject to a special security regime any longer than the risk they present makes necessary." *Id.* at 28; *see also* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Finnish Government on the visit to Finland, from 10 to 20 May 1992*, CPT/Inf (93) 8 [EN] (1993). ("the mental and physical state of all prisoners placed in solitary confinement must be the subject of special attention").

In order to avoid erroneous or unnecessary assignment to or continued confinement in solitary conditions, the CPT recommends that any decision to subject a prisoner to high security units be accompanied by certain procedural safeguards -- "[t]he prisoner should be informed of the reasons for the measure taken against him, be given an opportunity to present his views on the matter before a definitive decision is taken, and be able to contest the measure before an appropriate authority." *CPT Standards* at 19. The CPT further recommends a full review of the necessity of the classifications and security measures, for each prisoner, at least every three months "by staff specially trained to carry out such an assessment." *Id.* at 28. The procedures recommended by the CPT are the very type of protections that the court below sought to ensure were provided to the prisoners subject to confinement by the OSP in its "supermax" facilities.

2. International Human Rights Organizations

According to Human Rights Watch, a human rights assessment of "supermax" confinement requires three key factors: eligibility criteria, specific conditions and the

duration of confinement, with each considered in relation to the other. *See Out of Sight, supra.*

> Extreme restrictions and controls that might be considered reasonable in dealing with incorrigibly violent inmates become excessive for inmates who are not. Deprivation of sources of stimulation, human contact and activity that may not be unbearably cruel for some inmates can become torture when imposed on mentally ill inmates. Harsh conditions that might not be unacceptable for a month or two become inhumane and degrading when imposed for years.

Id.

Human Rights Watch has developed detailed recommendations addressing all three of these factors which, if followed, would reduce the current conflict between "supermax" confinement and respect for human rights of inmates. These recommendations expressly address the procedural protections necessary to ensure inmates are not unnecessarily placed in supermaximum confinement. Human Rights Watch insists that prisoners should not be confined in such conditions except when their behavior has shown them to be so chronically violent or dangerous and to pose such a demonstrable, extremely serious threat to prison safety and security that prison officials have no other choice. Even then, confinement in "supermax" should be for the shortest period of time possible in light of legitimate security and safety considerations. Moreover, inmates should have meaningful opportunities to both contest assignment to or continuation in "supermax" confinement and appeal those decisions. All inmates should be given a written, detailed and individualized explanation of the specific reasons for their initial and continued "supermax" confinement and have the right to meaningful periodic review. *See Out of Sight, supra.*

Similarly, Amnesty International has recommended that "authorities in supermax units amend their policies to . . . establish clear criteria for and regular review of placement in supermax prisons." *Amnesty International's Recommendations to the United States Government to Address Human Rights Violations in the USA* (August 1, 1998), *available at* http://web.amnesty.org/library/index/engamr510461998.[16]

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[16] The concerns of these organizations with regard to "supermax" facilities in the United States are not limited to the process by which prisoners are assigned to these facilities and by which they are kept there for extended periods of time. Like Human Rights Watch, Amnesty International has expressed grave concern about the proliferation of "supermax" facilities in the United States. While recognizing that "it is sometimes necessary to segregate prisoners for safety or security reasons," Amnesty International has found "conditions in many U.S. supermax facilities [] far more punitive than is required for legitimate security purposes and constitute cruel inhuman and degrading treatment in violation of international standards." *A Briefing for the UN Committee against Torture* at 22. Many of the conditions typical of "supermax" confinement contribute little or nothing to the overall security of a facility. Lack of windows, and access to fresh air and light, denial of reading material, lack of outdoor recreation, lack of in-cell as well as out-of-cell education and training programs, provide no added security. Such deprivations can only be explained as reflecting an unwillingness to acknowledge an inmate's basic humanity and thus violate basic tenets of international law. *See Cold Storage, supra.* Moreover, many "supermax" units or facilities breach the specific standards contained in the United Nations Standard Minimum Rules for the Treatment of Prisoners, including those specifying the need

(Footnote continued)

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In sum, international human rights principles -- as well as the application and interpretation of those principles by international courts, official bodies, and established human rights organizations -- reinforce the conclusion that, to the degree "supermax" prisons are permitted to be used, the greatest possible care must be taken to ensure that only persons requiring confinement in such facilities are assigned to them and that persons remain in those facilities only so long as is necessary.

Under our constitutional system, the procedural protections of due process of law are the mechanisms upon which our Nation relies to ensure the kind of accurate and fair decisionmaking that principles of International Law require before these extreme conditions are imposed on prisoners. In this case, the courts below correctly found the system that OSP had for placement to be wanting in this critical regard, and imposed minimum requirements to

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for windows, natural light, fresh air and daily outdoor exercise. *See A Briefing for the UN Committee against Torture* at 23. Like Human Rights Watch, Amnesty International is especially concerned about the severe psychological damage caused by prolonged isolation and reduction of sensory stimulation, particularly on mentally ill or disturbed prisoners who continue to be held in "supermax" facilities without adequate treatment or monitoring, despite the documented deleterious affect of "supermax" confinement on the mentally ill. *See* Amnesty International, *Open Letter to the President of the United States from Amnesty International following Hearings Held by the United Nations Committee against Torture* (June 22, 2000), *available at* http://web.amnesty.org/library/index/engamr511072000.

Constitution -- require nothing less in these circumstances of extreme deprivations and degradation, as well as extreme psychological and emotional risk.

CONCLUSION

For the foregoing reasons, Amici Curiae Human Rights Watch, American Friends Service Committee, Bluhm Legal Clinic, The Center for Justice In Capital Cases, Illinois Association of Criminal Defense Lawyers, and National Lawyers Guild respectfully submit that the judgments of the courts below should be affirmed.

Respectfully submitted,

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